



September 4, 2001

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-3907

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151452.

The Texas Department of Human Services (the "department") received a request for "the most recent on-site review plus complaint history" for two locations of a specified facility. You state that some of the requested information will be released to the requestor. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with various state and federal statutes. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert that the documents in Attachment C are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code. Section 142.009(d) provides as follows:

The reports, records, and working papers used or developed in an investigation made under [Chapter 142] are confidential and may not be released or made public except:

(1) to a state or federal agency;

- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule;
- (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency;
- (6) on a form required by a federal agency if:
 - (A) the information does not reveal the identity of an individual, including a patient or a physician or other medical practitioner;
 - (B) the service provider subject to the investigation had a reasonable opportunity to review the information and offer comments to be included with the information released or made public; and
 - (C) the release of the information complies with any other federal requirement; or
- (7) as provided by Section 142.0092.

Health & Safety Code § 142.009(d). You state that First Choice Children's Home Care is a home and community support agency regulated by the department under chapter 142 and that the documents in Attachment C constitute reports, records, and working papers that were used or developed during a complaint investigation made under section 142.009(c) of the Health and Safety Code. You have provided no information that would allow us to conclude that any of the exceptions to confidentiality in section 142.009(d) apply in this instance. Based on your representations and our review of the submitted information, we conclude that the department must withhold the information in Attachment C pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code.

Next, you contend that certain information in the federal forms submitted as Attachment D, Form HCFA 2567, Statement of Deficiencies and Plan of Correction, is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal regulations and section 142.009(d)(6) of the Health and Safety Code. Federal regulations

require the department to release the HCFA 2567 forms, which contain a statement of deficiencies and plan of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988); *see also* Health & Safety Code § 142.009(d)(6). You explain that the facility has offered comments in response to each evaluation and, therefore, has had a reasonable opportunity to review the report. We agree that the signature of the facility's representative on the forms, together with the facility's comments, indicate that the facility has had a reasonable opportunity to review the report and offer comments. You claim that the identifying information of the individual found in the federal form is confidential under section 142.009(d)(6). Based on your representations and our review of the submitted information, we conclude that the department must withhold the name of the individual highlighted in Attachment D under the federal regulations and section 142.009(d)(6).

Next, you contend that certain information in the state forms submitted as Attachment E, Statement of Licensing Violations and Plan of Correction, is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code. As noted above, section 142.009(d) states that "reports, records, and working papers used or developed in an investigation . . . are confidential and may not be released or made public except: (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency." Health & Safety Code § 142.009(d)(5). You acknowledge that section 142.009(d)(5) requires the department to release this state form; however, you contend the department must withhold the name of the individual contained within the form under section 142.009(d)(5). Based on your representations and our review of the submitted information, we conclude that the department must withhold the name of the individual highlighted in Attachment E under section 142.009(d)(5).

Lastly, you contend that some of the information in Attachment E is made confidential under the Medical Practice Act, (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.